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TRANSMITTING, EDITING, AND COMMUNICATING: DETERMINING WHAT "THE FREEDOM OF SPEECH" ENCOMPASSES

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ABSTRACT

How much can one say with confidence about what constitutes "the freedom of speech" that Congress shall not abridge? In this Article, I address that question in the context of the transmission of speech—specifically, the regulation of Internet access known as net neutrality. This question has implications both for the future of economic regulation, as more and more activity involves the transmission of bits, and for First Amendment interpretation. As for the latter, the question is what a lawyer or judge can conclude without having to choose among competing conceptions of speech. How far can a basic legal toolkit go? Using that toolkit, I find that bare transmission is not speech under the First Amendment, and that most forms of manipulation of bits also would not qualify as speech.

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Adopting any of the leading conceptions of the First Amendment would narrow the range of activities covered by the First Amendment. But even without choosing among those conceptions we can reach some meaningful conclusions about the limited application of the First Amendment to Internet access providers.

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INTRODUCTION

On the central question of what is covered by the Free Speech Clause of the First Amendment,[1] what seems to be settled ground? Are threats "speech"? What about conduct that may convey a message (e.g., destroying a lab where animals would be tested)? Academic commentary and judicial opinions have addressed many of these boundary questions—discussing, for instance, when threats and conduct are speech under the First Amendment.[2] One question that has received fairly little attention, however, is the circumstances under which the transmission of speech is encompassed by "the

1. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

2. *See, e.g.*, NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) (finding that "threat[s] of retaliation based on misrepresentation and coercion [are outside] the protection of the First Amendment"); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004) ("At times the First Amendment's boundaries have figured in the case law and academic commentary, as with the familiar debates about whether obscenity, libel, fighting words, and commercial advertising are inside or outside the coverage of the First Amendment.").

freedom of speech."[3] As more activity occurs online, the transmission of bits of data—and the legal status of that transmission—becomes more important. This Article addresses the question of whether, and how, the First Amendment constrains the government's ability to impose nondiscrimination rules on the transmitters of those bits.[4]

This question is important in its own right, as First Amendment scrutiny poses significant hurdles to government regulation.[5] To the extent that the transmission of bits is treated as part of the freedom of speech, regulation of such transmission will be subject to heightened judicial scrutiny that will invalidate some regulations that would survive absent First Amendment scrutiny.[6] Simply stated, regulating transmitters of bits will become much more difficult. The ramifications of such judicial scrutiny will increase over time: with each passing year, more aspects of our lives are encapsulated as bits traveling through wires and over the airwaves.

The question addressed in this Article also highlights larger issues about the nature of legal interpretation, and interpretation of the Free Speech Clause in particular. That clause has been subject to endless debate, with commentators finding little common ground. Theorists have put forward a multitude of conceptions of the Free Speech Clause, each of which values—and thus treats as speech covered by the clause—different forms of communication. Those who, for example, think the Free Speech Clause is best understood as a protection of personal autonomy see the clause as encompassing and protecting a very different set of communications from those who

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3. In this article, I will use the term "freedom of speech" to refer to the freedom protected by the Free Speech Clause. That is, I will be using it in a specific legal context, not as a broader philosophical term. To avoid visual clutter, in most instances I will refer to the freedom of speech without quotation marks. By contrast, I will use the term "speech" to refer to its usage in the Free Speech Clause only when I so indicate.

4. For the purposes of this Article, I am focusing on the speech interests of Internet access providers—the entities that provide Internet service to customers. These companies have been the main opponents of net neutrality regulations and the main ones invoking the First Amendment against such regulations. Others in the Internet ecosystem—most notably, customers—have a different set of interests, and I do not address them in this Article.

5. The First Amendment encompasses more than the Free Speech Clause, of course. For the purposes of this Article, when I refer to the First Amendment I am referring to its Free Speech Clause component.

6. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1370 (1998) ("[T]he First Amendment has become the preferred constitutional assault vehicle for telecommunications companies challenging government regulation."). For a discussion of judicial scrutiny of speech regulations, see *infra* notes 24–25 and accompanying text.

see it as checking government power or enhancing democratic deliberation.[7] The result is that there is no agreement about what is outside the realm of the freedom of speech. One or more theories would treat computer code,[8] maps,[9] and sex[10] as speech under the First Amendment. It is difficult, if not impossible, to refute one or another conception of what the freedom of speech *really* means. This is not to suggest that there is no basis upon which one could choose one conception or another, but rather that the basis for choosing one—and for rejecting others—is heavily dependent on values and goals that do not submit to proof. That is, the arguments for these conceptions do not, by and large, depend on steps that can be refuted. Thus, in the realm of theory, the answer to the question of what constitutes the freedom of speech depends on the conception one adopts, and one's choice of conception is more analogous to a purely subjective preference than to a conclusion reached by a series of falsifiable steps.

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7. *See infra* notes 54–56 and accompanying text. The question of what is encompassed by the First Amendment is different from the question of what is protected by the First Amendment. Some speech that is included within the freedom of speech—and thus covered by the First Amendment—may not be protected from regulation. Secret battle plans, for instance, are speech for First Amendment purposes, but courts, and many theorists, would nonetheless permit the regulation of their distribution. This Article focuses on the question of coverage—what the First Amendment encompasses. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89–92 (1982) (discussing the distinction between First Amendment coverage and protection); Schauer, *supra* note 2, at 1771 ("Questions about the boundaries of the First Amendment are not questions of strength—the degree of protection that the First Amendment offers—but rather are questions of scope—whether the First Amendment applies at all.").

8. *See* Bernstein v. U.S. Dep't of Justice, 176 F.3d 1132, 1147 (9th Cir. 1999) (concluding that "encryption software, in its source code form and as employed by those in the field of cryptography, must be viewed as expressive for First Amendment purposes"), *reh'g en banc granted and opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999); Schauer, *supra* note 2, at 1794 ("The anti-Microsoft and anti-Hollywood claims of the open-source movement focus on the way in which computer source codes can be conceived of as a language and therefore as speech . . . ."); Lee Tien, *Publishing Software as a Speech Act*, 15 BERKELEY TECH. L.J. 629, 664–65 (2000) (arguing that using computer code is participating in scientific discourse and, therefore, is speech under the First Amendment).

9. *See* Schauer, *supra* note 2, at 1801–02 (suggesting that maps satisfy at least one of Kent Greenawalt's four factors for First Amendment coverage because they are speech that is "general rather than [related] to a specific transaction").

10. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1017–18 (1978) (arguing that "sexual behavior between consenting adults" is encompassed by the First Amendment); Schauer, *supra* note 2, at 1794 ("[T]he sexual liberty and antipaternalism claims of those who object to laws restricting sexual conduct typically focus on those aspects of the sex industry . . . that can be conceptualized as involving free speech issues.").

The aim of this Article is to see how far legal scholarship can go—and, concomitantly, where it cannot go—relying only on broadly accepted sources and forms of reasoning. This, in turn, raises an anterior question: what are those broadly accepted sources and forms of reasoning? This could be the subject of a book in its own right, but I will utilize some basic tools of legal analysis—text, history, Supreme Court jurisprudence, basic analogical reasoning, and widely accepted conceptions. How far can these tools take us?

One way of understanding this Article is that it addresses the extent to which lawyers can reach any meaningful conclusions about what the freedom of speech encompasses by relying on a basic legal toolkit and broadly shared principles. Do lawyers and judges need to adopt a particular conception of the First Amendment in order to decide what the freedom of speech encompasses?[11] Part of the significance of this question arises from the fact that this approach approximates the position of the Supreme Court. Text, history, Supreme Court jurisprudence, basic analogical reasoning, and widely accepted conceptions are not only lawyers' but also the Supreme Court's basic toolkit. And the Court has never settled upon a conception of the First Amendment. The Court has invoked the marketplace of ideas more than any other conception of the First Amendment, but different cases have emphasized different conceptions, and in many cases the Court has refrained from choosing among them.[12] This is not surprising: each possible conception of the

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11. *See* Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 716 (2000) ("[Another theorist] is fundamentally misguided to believe that he can explain First Amendment coverage 'without appealing to a grand theoretical framework of First Amendment values.' If First Amendment coverage does not extend to all speech acts, then such a framework is at a minimum necessary in order to provide the criteria by which to select the subset of speech acts that merit constitutional attention." (quoting Tien, *supra* note 8, at 636)).

12. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573–74 (1995) (emphasizing the centrality of autonomy to the First Amendment); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 n.11 (1978) ("Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.'" (alteration in original) (quoting THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 9 (1966))); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."); Robert Post,

First Amendment can be subjected to legitimate criticism, and reaching agreement at that level of specificity is difficult for any group, Justices or otherwise. The Supreme Court's First Amendment jurisprudence is thus one of the many areas characterized by incompletely theorized agreements.[13]

One can thus fairly present the question addressed by this Article as whether conventional legal analysis can meaningfully guide the Supreme Court in applying the First Amendment to the transmission of bits.[14] In this Article, I suggest an affirmative answer. I find that the basic legal toolkit counsels against treating the freedom of speech as encompassing the application of nondiscrimination rules to transmitters of speech. There is fairly little support for treating a company's transmission, standing alone, as speech for First Amendment purposes, and there are strong reasons to reach the opposite conclusion. The same tools indicate that some forms of editing will trigger the First Amendment, and they provide a significant amount of guidance in determining what form that editing must take.

That said, none of the arguments I present are ineluctable. If we cannot have confidence in analysis that proceeds from widely accepted premises and uses widely accepted tools, what should that tell us? That we can never have confidence in our interpretations of the First Amendment, or that we must wait for the Supreme Court to weigh in? That the Supreme Court, in turn, must either choose a specific conception of the First Amendment or make an essentially arbitrary decision, because conventional legal analysis without a specific conception provides no meaningful guidance?

Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 CALIF. L. REV. 2353, 2372–73 (2000) (noting that the Supreme Court has not consistently followed any one theory of the First Amendment).

13. *See* Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 48 ("Many judges are minimalists; they want to say and do no more than necessary to resolve cases. . . . [Minimalists] attempt to reach *incompletely theorized agreements*, in which the most fundamental questions are left undecided. They prefer outcomes and opinions that can attract support from people with a wide range of theoretical positions, or with uncertainty about which theoretical positions are best. In these ways, minimalist judges avoid the largest questions about the meaning of the free speech guarantee, or the extent of the Constitution's protection of 'liberty,' or the precise scope of the President's authority as Commander in Chief of the Armed Forces." (footnote omitted)).

14. This is different, of course, from the question of whether such analysis—as opposed to other considerations—will actually persuade Justices. Whatever does, in fact, motivate Justices, my question here is how much work conventional legal analysis can do.

Part I briefly describes what is at stake, noting the net neutrality context in which this issue arises and the larger First Amendment backdrop. If the First Amendment applies to all regulations of bit transmitters, an increasingly large part of the economy will be subject to heightened judicial scrutiny. Part II considers the applicability of the Free Speech Clause to a company's transmission of speech, standing alone. It finds that neither traditional interpretive tools nor any of the proffered conceptions of the First Amendment support the idea that bare transmission is part of the freedom of speech. Part III asks what manipulation of bits by Internet access providers would constitute speech under the First Amendment, and finds that widely accepted premises and sources—in particular, precedents and an overinclusive definition of "communication"—can provide a fair amount of guidance, revealing that most of the activities of Internet access providers fall outside the scope of the freedom of speech.

I. THE STAKES

The question of First Amendment coverage on which this article focuses arises in the immediate context of Internet access and net neutrality—to oversimplify greatly, the proposition that the government should prevent broadband Internet access providers from engaging in unreasonable discrimination in their treatment of Internet traffic.[15] The meaning of this formulation depends on the definition of unreasonable discrimination, and there has been a robust debate as to which actions by Internet access providers should be prohibited and which should be permitted.[16] The starting position for net neutrality proponents is "that the Internet has thrived because of its freedom and openness—the absence of any gatekeeper blocking lawful uses of the network or picking winners and losers online."[17] Their concern is that the companies that provide Internet access have the incentive and ability to block, degrade, or prioritize particular content, applications, services, or devices based on payments or other

15. There are various terms that can be used to describe the entities involved. "[B]roadband Internet access service provider" is the full term that the FCC used in its order on the open Internet and net neutrality. *See* Preserving the Open Internet, 25 FCC Rcd. 17,905, 52 Commc'ns Reg. (P & F) 1, 49 (Dec. 21, 2010) (report and order). As a convenient shorthand in this Article, I will refer to "Internet access providers."

16. *See, e.g.*, Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (2007) (debating net neutrality).

17. *Preserving the Open Internet*, 52 Commc'ns Reg. (P & F) at 3.

considerations.[18] In December 2010, the Federal Communications Commission (FCC) issued a lengthy report and order[19] staking out its own position on net neutrality.[20]

Some commentators have addressed the First Amendment issues raised by net neutrality regulations. Some have contended that net neutrality regulations do not trigger Internet access providers' free speech interests, but their arguments have generally placed heavy emphasis on conceptions of the First Amendment that are not broadly shared.[21] Rejecting the application of the First Amendment to regulation of Internet access providers has thus depended on the acceptance of a particular vision of the First Amendment. Most commentators who have addressed the issue have contended that Internet access providers' First Amendment rights are implicated by net neutrality regulations, and have focused on how First Amendment scrutiny would apply to such regulations.[22] Their

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18. *Id.* at 8–13; *see also id.* at 8 (identifying "three [basic] types of Internet activities: providing broadband Internet access service; providing content, applications, services, and devices accessed over or connected to broadband Internet access service ('edge' products and services); and subscribing to a broadband Internet access service that allows access to edge products and services").

19. Preserving the Open Internet, 25 FCC Rcd. 17,905, 52 Commc'ns Reg. (P & F) 1 (Dec. 21, 2010) (report and order).

20. The FCC order, *inter alia*, prohibits a fixed Internet access provider from "*unreasonably discriminat*[*ing*] *in transmitting lawful network traffic over a consumer's broadband Internet access service*," but exempts "[*r*]*easonable network management*" from this prohibition. *Id.* at 23–24. It defines reasonable network management as:

> ensuring network security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users (including by premise operators), such as by providing services or capabilities consistent with an end user's choices regarding parental controls or security capabilities; and reducing or mitigating the effects of congestion on the network.

Id. at 28 (footnotes omitted). And it states that "a commercial arrangement between a broadband provider and a third party to directly or indirectly favor some traffic over other traffic in the broadband Internet access service connection to a subscriber of the broadband provider (*i.e.*, 'pay for priority') would raise significant cause for concern." *Id.* at 25.

21. *See, e.g.*, Marvin Ammori, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 303 (2009) ("Government attempts to promote democratic content should be subject to a viewpoint-neutral test, not content analysis. The most widely accepted values underlying the First Amendment support this conclusion, and potential objections do not undermine it."); Bill D. Herman, *Opening Bottlenecks: On Behalf of Mandated Network Neutrality*, 59 FED. COMM. L.J. 103, 112 (2006) ("First Amendment values are best upheld by ensuring media diversity—not merely content diversity, but a diversity of stakeholders who have editorial control over that content.").

22. *See, e.g.*, Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1321 (2010) (asserting that Internet service providers (ISPs) are First Amendment speakers when they operate in a non-neutral way); Randolph J. May, *Net*

assumption seems to be that the precedents applicable to cable television operators obviously apply to Internet access providers.[23] In this Article, I find that any such assumption is too facile.

This Article uses the example of net neutrality regulation to consider the contexts in which bit transmitters' First Amendment interests might be implicated. I consider the kinds of activities that broadband access providers might want to engage in but that might be limited by net neutrality regulation.

Net neutrality is only one example, however, of the larger question that this Article addresses—the circumstances under which transmitters of speech are engaged in speech for First Amendment purposes. Net neutrality regulations raise this question, but it can and likely will arise in a variety of contexts.

Those contexts become more numerous and more important with each passing year. The continual increase in online activity means that more activity takes the form of bits traveling through wires and the airwaves. Applying the First Amendment to the transmission of bits would mean significant judicial scrutiny of a bigger and bigger part of the economy. Regulations that trigger the Free Speech Clause are reviewed under intermediate scrutiny at a minimum, and strict scrutiny in many contexts. Under strict scrutiny, applicable to content-based regulation of speech, the government interest must be "compelling" and the statute must be the least restrictive means to further the articulated interest[24]—a test that is rarely satisfied. Intermediate scrutiny applies to content-neutral

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Neutrality Mandates: Neutering the First Amendment in the Digital Age, 3 ISJLP 197, 202–09 (2007) (discussing the different ways in which the First Amendment applies to net neutrality regulation); Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from* Turner *and a New Approach*, 13 VA. J.L. & TECH. 1, 21 (2008) ("[C]lassifying network-neutrality rules as content neutral and therefore subject to intermediate scrutiny is not a hard case.").

23. *See* Frieden, *supra* note 22, at 1313 ("As a threshold matter, ISPs qualify for some degree of First Amendment protection in their capacity as content packagers, in much the same way as cable television operators load channels of content onto various programming tiers of service."); May, *supra* note 22, at 202–03 ("Like newspapers, magazines, cable operators, movie and music producers, and even the man or woman preaching on a soapbox, ISPs such as Comcast and Verizon possess free speech rights."); Yemini, *supra* note 22, at 21–22 ("The Court's line of reasoning in differentiating between cable and broadcast, on the one hand, and between cable and newspapers, on the other hand, seems applicable also to [broadband service providers] in the context of network neutrality.").

24. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

regulation of speech and is more frequently satisfied. But intermediate scrutiny is still a serious undertaking. The challenged regulation must serve an "important or substantial governmental interest" unrelated to the suppression of speech and cannot burden substantially more speech than is necessary to further that interest.[25]

This is much more rigorous review than ordinary economic regulation is subject to. The constitutional review of economic regulation is very forgiving, and indeed it is hard for the government to lose. Review of agency regulations under the Administrative Procedure Act has more bite,[26] but it is still much less rigorous than intermediate scrutiny under the First Amendment.

Thus what is at stake is whether a growing part of our economy and society—the transmission of bits—will be subject to scrutiny that will invalidate many ordinary forms of regulation. Note that courts could reduce the chances of such invalidation by softening intermediate scrutiny—or even creating a new, weaker form of scrutiny for the transmission of bits. But before courts start tinkering with the levels of scrutiny, they should ask whether the relevant activities are covered by the Free Speech Clause in the first place. Of course, if that is what the First Amendment calls for, then so be it. But *is* that what the First Amendment calls for?

II. TRANSMITTERS OF SPEECH

If a company acts as a pure transmitter of speech—simply moving the speech from *A* to *B* without editing the speech or exercising a preference among speakers—is it engaging in speech for First Amendment purposes? Assume for the purposes of this Part that the company acts as a nondiscriminatory transmitter and makes no editorial choices, and that the relevant laws require such nondiscriminatory transmission but impose no further regulation on transmission. Is the mere act of transmission a form of speech, such that any regulation of it implicates the Free Speech Clause?

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25. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 662 (1994) ("[A] content-neutral regulation will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968))).

26. *See* 5 U.S.C. § 706(2)(A) (2006) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]").

A. The Difficulties with an Argument that Pure Transmission Is Speech

The best argument in favor of applying the First Amendment to nondiscrimination regulation of bit transmitters is that the text compels it: the transmission of bits is speech, and thus any regulation of bit transmitters implicates the First Amendment. This contention does not take the analysis very far. At the outset, it bears noting that the Free Speech Clause prohibits abridgement of "the freedom of speech," not "speech" standing alone.[27] And, needless to say, neither "speech" nor "the freedom of speech" is a self-defining term. This is a perennial problem with textual analysis of the Free Speech Clause: as a textual matter, "speech" and "the freedom of speech" could be interpreted in any of a variety of ways. Everyone might agree on some core elements, but the textual boundaries of these terms are not apparent.[28]

Tools of originalism also are of limited help in determining the meaning of "the freedom of speech." As Leonard Levy noted more than half a century ago, "The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been [as] obscure to us" as the Free Speech Clause.[29] That said, the materials

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27. *See* John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1296 (1993) ("I emphasize the word 'the' as used in the term 'the freedom of speech' because the definite article suggests that the draftsmen intended to immunize a previously identified category or subset of speech. That category could not have been co-extensive with the category of oral communications that are commonly described as 'speech' in ordinary usage."); WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 24–26 (1984) (emphasizing the importance of determining whether some claimed speech is part of the freedom of speech).

28. Akhil Amar has argued that intratextualism—identifying terms appearing in different parts of the Constitution and interpreting them to have similar meanings—illuminates the meaning of "speech" under the Free Speech Clause. In particular, he contends that the term "speech" in the Speech or Debate Clause, which provides that senators and representatives "shall not be questioned in any other Place" for "any Speech or Debate in either House," U.S. CONST. art. I, § 6, applies only to political speech, and thus we should interpret the Free Speech Clause to cover only, or at least primarily, political speech. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 815 (1999). For my purposes, it bears noting that Amar's interpretation of the First Amendment is widely contested, but that, if it were adopted, it would almost certainly doom any claim that a company's transmission of speech is covered by the Free Speech Clause. *See generally* Adrian Vermeule & Ernest A. Young, Commentary, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730 (2000) (criticizing Amar's intratextualism).

29. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 4 (1960); *see also* Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 82, 85 (Eugene W. Hickok, Jr. ed., 1991) ("The debates in Congress

that we do have from the Framing era suggest that those in the Framing generation had a narrower conception of the freedom of speech than do modern courts, and many in the Framing generation adhered to Blackstone's position that the freedom of speech was best understood as a freedom from prior restraints.[30] Beyond that, the Framing generation emphasized that the freedom of speech was a personal right applicable to individuals.[31] It is not at all clear how far, if at all, the Framing generation would have applied the freedom of speech to corporations.[32]

We can look to analogical reasoning—probably the most widely accepted form of legal reasoning.[33] Analogies can be revealing and

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concerning the speech and press clauses shed scant light on the question of meaning. . . . Nor do we find enlightening comments in the state legislatures that considered the amendments or the local newspapers or pamphlets of the time.").

30. *See, e.g.*, LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 46 (1963) ("Jefferson, by contrast, never protested against the substantive law of seditious libel . . . . He accepted without question the dominant view of his generation that government could be criminally assaulted merely by the expression of critical opinions that allegedly tended to subvert it by lowering it in the public's esteem."); LEVY, *supra* note 29, at vii ("The evidence drawn particularly from the period 1776 to 1791 indicates that the generation that framed . . . the First Amendment was hardly as libertarian as we have traditionally assumed."); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("In colonial times and during and after the Revolution [early political leaders] displayed a determination to punish speech thought dangerous to government, much of it expression that we would think harmless and well within the bounds of legitimate discourse."); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 60, 60 n.294 (2005) ("Since the First Amendment only applied against Congress, this approach assumed that the federal government could punish seditious, libelous, blasphemous, obscene, or indecent speech with impunity so long as it did not censor the speech in advance."); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *151 ("The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.").

31. *See, e.g.*, Julian N. Eule, *Promoting Speaker Diversity:* Austin *and* Metro Broadcasting, 1990 SUP. CT. REV. 105, 129 ("The framers of the First Amendment could scarcely have anticipated its application to the corporate form. That, of course, ought not to be dispositive. What is compelling, however, is an understanding of who was supposed to be the beneficiary of the free speech guaranty—the individual.").

32. *Compare* Citizens United v. FEC, 130 S. Ct. 876, 950 (2010) (Stevens, J., concurring in part and dissenting in part) ("Unlike our colleagues, [the Framers] had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind."), *with id.* at 928 (Scalia, J., concurring) ("[T]he individual person's right to speak includes the right to speak *in association with other individual persons*. . . . The association of individuals in a business corporation . . . cannot be denied the right to speak on the simplistic ground that it is not 'an individual American.'").

33. *See* LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT 96 (2005) (stating that "analogical reasoning is not a convenience but a necessity" in the law).

can legitimately lead lawyers and judges to reject some arguments.[34] If, for instance, under some interpretation the freedom of speech would apply to most business decisions, that interpretation would be problematic. The First Amendment, after all, flatly prohibits any abridgement of the freedom of speech, and interpreting the text to apply that prohibition to most business decisions does not seem to be a faithful interpretation, under any meaning of the term faithful.[35] Just as it would misshape and demean the religion clauses of the First Amendment to find that "religion" encompassed every belief, it would misshape and demean the First Amendment to find that the freedom of speech encompassed every act that relates to information. "[T]he freedom of speech" is a broad and powerful term, but an interpretation that leaves little outside of its ambit is an implausible one, as a matter of textual construction.

In this case, analogical reasoning highlights the implausibility of an interpretation of the Free Speech Clause that bare transmission is speech. Imagine that FedEx decided to speed up the delivery of documents addressed to companies with which it had a financial relationship; that is, FedEx would give preferential treatment in its delivery schedule to documents sent to companies that paid it for the privilege. A congressional decision to ban such a practice may or may not be good policy, but it would not seem to raise First Amendment issues. Yes, FedEx would be moving First Amendment-protected materials—documents—from one user to another, but it is hard to see how transporting documents turns a company into a speaker for First Amendment purposes. More precisely, the freedom of speech would not seem to encompass FedEx's business model. A company devoted to transporting messages with which it agreed—imagine a courier service that limited itself to communications between Republican- or Democratic-affiliated groups—would be a different matter. In that

34. *See id.* at 97 ("[I]f the reasons for a rule are not substantial, that may suggest that the analogy supporting its application is weak and that some other analogy pointing to a different rule is to be preferred. Or, if the analogy is weak, that may suggest that less weight should be given to the reasons for the rule to which the analogy points."); *see also* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1196 (1999) (remarking that the important part of analogical reasoning is "the sense of obligation to study prior cases and either conform to them or explain why they should be disregarded"); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 775 (1993) ("Principles [of law] are . . . both generated and tested through confrontation with particular cases.").

35. For two different discussions of faithful interpretation of the Constitution, see generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); and SANFORD LEVINSON, CONSTITUTIONAL FAITH (1989).

situation, the act of transmission would entail a communication: "We, the Republican [or Democratic] delivery service, are bringing you a document from a kindred spirit." But for a company like FedEx that does not so limit itself, there is no similar communication. The arrival of a FedEx truck gives no one any information about the content of the relevant document.[36]

Importantly, the argument that transmission equals speech would apply not only to ordinary carriers like FedEx but also to common carriers that carry speech. The obvious example is local telephone companies. They carry central forms of speech—conversations. If regulation of speech transmitters really does implicate the Free Speech Clause, then most (if not all) regulations of common carriers would trigger First Amendment scrutiny that would likely invalidate many of them.

There is nothing, as a matter of logic, that would prohibit the application of the First Amendment to the regulation of common carriers. But it would fly in the face of history and the consistent legal treatment of such carriers. The longstanding historical practice and understanding was that common carriers of speech were mere transmitters who were not speakers for purposes of the First Amendment.[37] As a jurisprudential matter, the Supreme Court has never suggested First Amendment coverage for bits qua bits, or for all speech transmitters. The Court has applied the First Amendment only to people or companies who do much more than merely transport.[38] No court has ever suggested that regulation of such carriage triggers First Amendment scrutiny. On the contrary, courts have long treated common carriage regimes as not raising First Amendment issues. Courts have placed common carriers and other mere conduits at the opposite end of the spectrum from speakers, and

36. A regulation that discriminated against the transmission of political speech, or speech on behalf of a political party, would trigger the application of the First Amendment. But the problem would be the government seeking to suppress speech based on its content or viewpoint, and that would occur whether the underlying activity was the transmission of speech or the transmission of electricity.

37. *See, e.g.*, Ellis v. Am. Tel. Co., 95 Mass. (13 Allen) 226, 231–32 (1866) ("[A]n owner or manager of [a telegraph] line becomes to a certain extent a public servant or agent. . . . He cannot refuse to receive and forward despatches; nor can he select the persons for whom he will act . . . . He is required to send [messages] for every person who may apply, at a usual or uniform tariff or rate, without any undue preference, and according to established regulations applicable to all alike.").

38. *See infra* notes 60–68 and accompanying text.

have held that conduits do not have free speech rights of their own.[39] Indeed, even the dissent in *Turner Broadcasting System, Inc. v. FCC* (*Turner I*),[40] which would have invalidated on First Amendment grounds a statute requiring cable operators to carry some broadcasters, suggested common carriage for cable operators as an alternative that would not run afoul of the First Amendment: "[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another."[41] Common carriers' main First

39. *See* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 739 (1996) (plurality opinion) (contrasting editors and common carriers for First Amendment purposes); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 655 (1994) ("Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."); FCC v. League of Women Voters, 468 U.S. 364, 378 (1984) (distinguishing between broadcasters and common carriers for First Amendment purposes); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (rejecting a shopping center owner's challenge to a state law preventing the owner from restricting messages expressed on its property because the shopping center is "a business establishment that is open to the public" and, thus, "[t]he views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner").

40. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622 (1994). *Turner I* was a First Amendment challenge to the "must carry" provisions, which require cable operators to carry local television broadcasters. *Id.* at 626.

41. *Id.* at 684 (O'Connor, J., concurring in part and dissenting in part). The most the Court has been willing to say is that applying the First Amendment to a regulation treating cable operators (who do have speech rights) as common carriers "is not frivolous." FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979) ("The court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute.").

In *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), a case invalidating statutory restrictions on telephone companies' carriage of indecent telephone messages, Justice Scalia, writing for himself in a concurrence, stated that "while we hold the Constitution prevents Congress from banning indecent speech in this fashion, we do not hold that the Constitution requires public utilities to carry it." *Id.* at 133 (Scalia, J., concurring). In a similar vein, several lower courts rejected First Amendment challenges to telephone companies' decisions not to carry indecent messages on the grounds that the telephone companies were not state actors. *See* Info. Providers' Coal. for Def. of the First Amendment v. FCC, 928 F.2d 866, 877 (9th Cir. 1991) ("Carriers are private companies, not state actors[,] and accordingly are not obliged to continue, restrict or terminate the services of particular subscribers. Thus, a carrier is free under the Constitution to terminate service to dial-a-porn operators altogether." (citation omitted)); Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co., 827 F.2d 1291, 1297 (9th Cir. 1987) ("The question is whether state action also inhered in Mountain Bell's decision to adopt a policy excluding all 'adult entertainment' from the 976 network. We hold that it did not."); Carlin Commc'n, Inc. v. S. Bell Tel. & Tel. Co., 802 F.2d 1352, 1361–62 (11th Cir. 1986)

Amendment success—their challenges to 47 U.S.C. § 533(b)—is also instructive on this point.[42] Neither the common carriers challenging the statute nor any of the courts (all of which accepted their arguments) suggested that the First Amendment applied to telephone common carriage service. Instead, the companies argued, and the courts held, that the First Amendment applied to a statutory provision that prevented common carriers from "providing video programming."[43]

Turning to the Supreme Court's jurisprudence, the Court has never held that the fact that an entity transmits speech means that regulation of such a transmitter is a regulation of the freedom of speech. Notably, in the 2006 case *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*,[44] the Court stated that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[45] The Court emphasized that "we have extended First Amendment protection only to conduct that is inherently expressive,"[46] and it has articulated a two-part test for

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(finding no state action); *see also Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 825 (Thomas, J., concurring in part and dissenting in part) ("Common carriers are private entities and may, consistent with the First Amendment, exercise editorial discretion in the absence of a statutory prohibition."). None of these points bears on the question whether a regulatory prohibition on common carriers' exercise of editorial discretion implicates the First Amendment. As I discuss in Part III, any carrier or provider can be a speaker for First Amendment purposes if it communicates messages through its manipulation of bits. The issue addressed in this Article is the contexts in which Internet access providers are engaged in such communications.

42. *See* Cable Communications Policy Act of 1984 § 613(b), 47 U.S.C. § 533(b) (1994) (repealed 1996) (prohibiting any common carrier from directly or indirectly providing video programming to its subscribers).

43. US West, Inc. v. United States, 48 F.3d 1092, 1102 (9th Cir. 1994) (quoting US W., Inc. v. United States, 855 F. Supp. 1184, 1191 (W.D. Wash. 1994)), *vacated*, 516 U.S. 1155 (1996); *see also* Chesapeake & Potomac Tel. Co. of Va. v. United States, 42 F.3d 181, 190 (4th Cir. 1994) ("It is clear that the provision of cable television service is a form of 'speech' protected by the First Amendment."), *vacated*, 516 U.S. 415 (1996).

44. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006).

45. *Id.* at 62 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (internal quotation marks omitted)).

46. *Id.* at 66; *see also* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."); United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to

determining when particular actions constitute speech: "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[47] The transmission of bits fails this test. Mere transmission does not reveal an intent to convey a message, and no message is likely to be understood.

Those arguing for application of the First Amendment to mere transmitters focus on the proposition that the transmitters' service is equivalent to the programming choices made by cable operators and thus is covered by the Supreme Court's statement in *Turner I* that cable programmers and cable operators engage in speech protected by the First Amendment.[48] Crucially, nothing in *Turner I* suggests that mere transmission constitutes speech for First Amendment purposes; in fact the opinion suggests the opposite. The key quotation from *Turner I* is illuminating:

> Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through "original programming or by exercising editorial discretion over which stations or programs to include in its repertoire," cable programmers

express an idea."); Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (quoting this language from *O'Brien* with approval); Texas v. Johnson, 491 U.S. 397, 404 (1989) (same). The quoted language from *Rumsfeld*, in focusing on conduct alone, has been subject to some criticism. *See* Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 243 ("No prior majority opinion on the subject has suggested that in deciding whether conduct is expressive we should look *only* at the conduct itself, rather than at both the conduct and the context in which it occurs."). But whether the focus is on conduct alone or conduct plus context, the key point is that there must be meaningful expression.

47. Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam)).

48. *See* Reply Comments of the National Cable & Telecommunications Ass'n at 41–42, Preserving the Open Internet, 25 FCC Rcd. 17,905, 52 Commc'ns Reg. (P & F) 1 (Dec. 21, 2010) (report and order) (GN Docket No. 09-191), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020437442 ("The same 'it's-just-transmission' argument could be made . . . about providers of cable service, given the fact that cable operators ultimately deliver the speech that they have chosen to offer to their customers."); Comments of Verizon & Verizon Wireless at 112, *Preserving the Open Internet*, 52 Commc'ns Reg. (P & F) 1 (GN Docket No. 09-191), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020378523 (analogizing Internet access providers to cable operators); LAURENCE H. TRIBE & THOMAS C. GOLDSTEIN, PROPOSED "NET NEUTRALITY" MANDATES COULD BE COUNTERPRODUCTIVE AND VIOLATE THE FIRST AMENDMENT 3 (2009), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020375998 (same); *supra* notes 22–23 and accompanying text.

> and operators "see[k] to communicate messages on a wide variety of topics and in a wide variety of formats."[49]

This passage is not consistent with the proposition that bare transmission implicates the First Amendment. Otherwise, the Court presumably would have said as much and let the matter rest there. Instead, the Court stated that the First Amendment applied because cable programmers and operators "*engage in and* transmit speech." The Court then further explicated that what made cable operators speakers was their own programming and their practice of "exercising editorial discretion" over which programs and stations to include (and thus which to exclude), entailing their "'see[king] to communicate messages.'"[50]

Note that nothing in any of this discussion depends on the transmitter having the status of a common carrier. For transmission qua transmission, it does not matter for First Amendment purposes whether the entity engaging in that transmission is treated as a common carrier. The points above would apply with equal force to an entity that is not regarded as a common carrier that engaged in pure transmission. So, for instance, in the previously discussed FedEx example,[51] FedEx would not have a First Amendment challenge to a regulation banning discrimination whether it was formally treated as a common carrier or not. The point about common carriage is that *if* bare transmission were speech, then common carriers would be engaged in speech. That is, a conclusion that mere transmission implicated the First Amendment would apply to common carriage.

Other possible arguments that bit transmission constitutes speech for First Amendment purposes depend on a prior decision that transmission constitutes speech, and thus rely on, rather than advance, the key assertion at issue here. One such argument is that refusing to either favor or disfavor bits is speech under the First Amendment. This argument flows from the fact that bit transmitters have the technological ability to alter some of their transmissions if they choose—to speed up, slow down, or block particular transmissions. They may or may not bother to develop these

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49. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994) (alteration in original) (citation omitted) (quoting City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986)). As the internal quotation indicates, the Court put forward the same test in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

50. *Turner I*, 512 U.S. at 636 (quoting *Preferred Commc'ns*, 476 U.S. at 494).

51. *See supra* text accompanying note 36.

capabilities, but the capabilities still exist. In light of these abilities, is the decision not to utilize them a form of speech for First Amendment purposes? The argument in support is fairly straightforward: transmitters' refusal to favor or disfavor bits is an editorial choice that sends a message to the world, just as much as sending an explicit announcement would.

The problem with this argument can be seen by taking it out of the context of bits. Imagine that some carriers of oil or gas gave preferential service to some companies' oil or gas, and other oil or gas carriers treated all companies' oil or gas equally, with no favor or disfavor toward any company's products. Both sets of carriers would be making choices that could be construed as communicating a message—"We give preferential treatment" versus "We treat every molecule of oil/gas the same"—but one would not treat either set of carriers' actions as implicating the First Amendment. Or, to put the point differently, if courts treated the First Amendment as applicable here, then the First Amendment would apply to every regulation. After all, a company could always claim that each of its practices communicates a message, and so any interference with any of its practices would interfere with its speech. Such an interpretation of the freedom of speech borders on the farcical, as it would be hard to imagine what the First Amendment would not apply to.

The point is that in order to treat a decision not to discriminate as triggering the First Amendment, the underlying activity must be speech. If transmitting bits were speech under the First Amendment, then refusing to give preferential treatment would also be speech. Nothing about a refusal to discriminate advances the argument that transmitting bits is speech. The status of the underlying activity as speech is necessary (but not sufficient) for a refusal to discriminate to fall within the freedom of speech.

This discussion demonstrates the problems with two closely related arguments—that the decision not to favor or disfavor bits is a form of silence under the First Amendment, and that forcing companies to carry bits they do not wish to carry is a form of compelled speech.[52] The argument based on silence is simply another form of the argument just discussed. Characterizing the refusal to discriminate as silence instead of speech does not change the analysis:

52. *See, e.g.*, May, *supra* note 22, at 202 ("Because neutrality mandates invariably require ISPs to send or post content which the ISPs might prefer not to send or post, they are, in effect, speech restrictions that infringe the ISPs' constitutional rights.").

silence can trigger the First Amendment only in the context of speech. The example regarding transmitters of oil or gas applies here as well. Or, to give a different illustration, a widget monopolist that chooses to be silent in response to other companies' requests to use its services cannot plausibly claim that its silence is speech under the First Amendment, any more than it could claim that its affirmative attempts to harm competition are speech under the First Amendment. Silence, standing alone, does not trigger First Amendment scrutiny. The relevant nonsilent activity must be speech in order for its absence—the silence—to constitute speech under the First Amendment. These arguments similarly apply to any suggestion of compelled speech. No transmitter of oil or gas could plausibly assert that being forced to carry some companies' oil or gas is compelled speech. As with the two arguments just discussed in the silence context, a claim of compelled speech depends on a prior decision that the bit transmitters are in fact speakers.[53]

B. Conceptions of the First Amendment and Pure Transmission

The discussion in Section A focuses on considerations that courts have traditionally emphasized in free speech analysis. It leaves out a major focus of some scholars—normative conceptions of the best way to understand the First Amendment. Scholars have put forward different underlying theories of the First Amendment—visions about what the freedom of speech really means and therefore how it should be understood. The main conceptions that have been offered over the years are the marketplace of ideas, the search for truth, the government-checking function, self-government, democratic deliberation, personal autonomy, and individual self-expression.[54]

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53. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 63–64 (2006) ("The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate. . . . In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions.").

54. On self-government and democratic deliberation, see generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 119–78 (1995); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); and Harry Kalven, Jr., *The* New York Times *Case: A Note on "the Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191. On the marketplace of ideas, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and JOHN STUART MILL, ON LIBERTY 9–10 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859). On the search for truth, see generally William P. Marshall, *In Defense*

All these conceptions would agree on a core that the freedom of speech would include—most notably political speech.[55] But the different theories lead to quite different conclusions about what the freedom of speech would exclude. For example, theories based on self-government or democratic deliberation would not include pornography or commercial advertising within the ambit of the First Amendment, the search-for-truth theory would exclude communications with no truth value, and a desire to check the government would not justify including speech that has nothing whatever to do with governance.[56]

The transmission of bits is a rare example of a speech-related activity that all these conceptions of the freedom of speech would exclude. That is, each one of these approaches would agree that a company's nondiscriminatory transmission should not be treated as speech under the First Amendment. The theory that would sweep the most within the freedom of speech is the marketplace of ideas. Whereas other theories indicate particular purposes that the First

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of the Search for Truth as a First Amendment Justification, 30 GA. L. REV. 1 (1995). On autonomy, see generally C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 194–224 (1989); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994); and Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979). On the checking function, see generally Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. On self-expression, see generally MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984); and David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). No theory has been widely accepted as explaining or driving First Amendment doctrine. *See, e.g.*, EMERSON, *supra* note 12, at vii ("Despite the mounting number of decisions and an even greater volume of comment, no really adequate or comprehensive theory of the First Amendment has been enunciated, much less agreed upon."); DANIEL A. FARBER, THE FIRST AMENDMENT 6 (2d ed. 2002) ("For a while there was a trend toward single-value theories of First Amendment law, in which a scholar would posit a single underlying constitutional value and then attempt to deduce all First Amendment doctrine from that value. Such efforts, whatever their merits, never seemed to persuade many other scholars and were almost entirely ignored by the courts.").

55. *See* Lillian R. BeVier, *On the Enduring Dilemma of Judicial Review*, 39 EMORY L.J. 1229, 1238–39 (1990) ("[T]here is consensus that political speech is at the amendment's core. Even today, however, there is no agreement about the periphery, about the other kinds of speech the amendment protects and why. Nor is there consensus yet about the underlying rationale for the protection of political speech."); *see also* MEIKLEJOHN, *supra* note 54, at 26 ("[T]he vital point, as stated negatively, is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another."); Bork, *supra* note 30, at 26 (stating that the First Amendment protects only "explicitly and predominantly political speech"); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207–08 (1982) (stating that "the central meaning of the First Amendment lies in its protection of debate of public issues").

56. Schauer, *supra* note 2, at 1785–86.

Amendment should serve, this theory posits that all ideas should be treated as part of the freedom of speech, and listeners (constituting the marketplace for those ideas) can evaluate them. The marketplace theory is sometimes criticized for bringing too much within the ambit of the freedom of speech—it would protect ideas no matter how repulsive, irrelevant to important values, or crassly commercial.[57] Indeed, a key facet (and, for many theorists, attraction) of the other conceptions of speech is that they would not indiscriminately protect all ideas, but instead would encompass those that advance the relevant purpose (for example, democratic deliberation).

Holding the marketplace of ideas aside for the moment, a company's nondiscriminatory transmission does not meet any of the purposes that theorists have laid out; nondiscriminatory transmission has no content, so it does nothing to enhance democratic deliberation, check the government, or meet any of the other stated purposes. Transmission can enable democratic deliberation and personal autonomy, but so can roads and public transportation. Transmission, after all, is just a form of transportation.[58] The idea behind these conceptions of speech is that there is some content that should be included in (and protected by) the First Amendment in order to preserve democratic deliberation or personal autonomy, and a company's nondiscriminatory transmission does not qualify.

The marketplace of ideas casts its net more widely by refusing to find some ideas more valuable than others, but it is still a marketplace of *ideas*. The proposition is that the government should not pass judgment among competing ideas, but should instead let them

57. *See, e.g.*, Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses*, 39 HARV. C.R.-C.L. L. REV. 335, 339 (2004) (arguing that the marketplace of ideas paradigm overprotects hate speech).

58. In some situations a regulation of specific kinds of transportation may be an attempt to suppress content and thus implicate the freedom of speech. Imagine a statute that prohibited use of the roads for political purposes. This is the theory behind the application of the First Amendment to regulations of campaign expenditures and contributions: when the government limits the use of money to pay for political speech, it is singling out for regulation one of many inputs into speech. The point of the jurisprudence is not that money equals speech, but that regulations aimed at political speech implicate the First Amendment, even when they target an input of speech rather than the speech itself. *See* Buckley v. Valeo, 424 U.S. 1, 16 (1976) ("[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment."); Eugene Volokh, *Why* Buckley v. Valeo *Is Basically Right*, 34 ARIZ. ST. L.J. 1095, 1101 (2002) ("Money isn't speech. But restricting speech that uses money is a speech restriction."). This is quite different from a law prohibiting discrimination in the transmission of bits, which of course does not target content in any way.

compete. But what are competing are different ideas.[59] And the point made in the previous paragraph applies here as well: a company's nondiscriminatory transportation (of bits or anything else) enables communication, but it has no content, and thus expresses no ideas.

C. Confidence

The argument that transmission qua transmission triggers the First Amendment is thus weak. But one could make the following counterargument to the analysis presented in this Part: a company's transmission of bits is its transmission of "speech" under the First Amendment, and thus is part of "the freedom of speech." This creates a strong presumption that the Free Speech Clause applies to any regulation of transmitters. There is no Supreme Court case that overcomes that presumption, nor do any of the other points marshalled in this Part. After all, the Supreme Court has never held that a transmitter is not covered by the First Amendment. Indeed, the Court has never even held that common carriage is not part of the freedom of speech. Courts and commentators have long treated common carriage as not implicating the First Amendment, but those views were ill-considered or wrong—common carriers are engaged in speech for purposes of the First Amendment. Yes, the Court's language in *Turner I* describing why cable operators are speakers is hard to explain if the Court believes that transmission alone turns cable operators into speakers, but (so the argument would go) that is not enough to defeat the hypothetically strong presumption arising from the text of the Free Speech Clause. Thus the presumption created by the text of the First Amendment has not been overcome, and a company's transmission is best understood as part of the freedom of speech.

The key move in the last paragraph is the presumption that transmission is speech. Absent fairly broad agreement about interpretive modalities or dispositive legal sources squarely on point, defaults and presumptions can do a tremendous amount of work.

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59. Robert Post argues that communication of ideas is necessary but not sufficient under the marketplace of ideas. *See* Post, *supra* note 12, at 2366 ("It is . . . inaccurate to infer that the theory of the marketplace of ideas requires that the First Amendment protect all speech that communicates ideas. Instead, the theory requires the protection only of speech that communicates ideas and that is embedded in the kinds of social practices that produce truth."). But communication of ideas is a *sine qua non.*

Does this mean that one cannot say anything about the coverage of the First Amendment beyond the trivial (for example, that murder is not speech)? That one cannot, as a competent legal analyst, identify one side of the argument as more persuasive than the other? I do not think so. I think the argument on one side is stronger. But if I ask instead my level of confidence in that position, and in particular whether I can rule out the contrary position, that is a quite different matter. Of course, this is not unique to transmission and speech: interpretive claims that are truly beyond the pale are few and far between, because some interpretive modality can support most any proposition. That may be a source of concern—and indeed, embarrassment—for lawyers and legal scholars, but addressing that issue is not my project here. My point, rather, is that I cannot rule out the arguments for transmission constituting the freedom of speech, but I can say that the arguments for that position are weak, and the arguments against it are strong.

This is not the end of the story, however, because one must still ask what beyond bare transmission constitutes speech for First Amendment purposes. I turn now to that issue.

III. EDITING AND COMMUNICATING

The previous Part indicates that a company's bare transmission is not speech for First Amendment purposes, so regulations prohibiting discrimination in transmission do not, without more, trigger application of the Free Speech Clause. But Internet access providers may want to engage in various forms of manipulation of the bits that they transmit. What forms of such manipulation would constitute speech that implicates the Free Speech Clause?

A. Broadly Accepted Sources and Forms of Reasoning

We can start with the Supreme Court, which has proffered an answer to this question. As I noted above, in *Turner I* the Court concluded that cable programmers and operators engage in speech. The reason, according to the Court, is that "[t]hrough 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and

operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'"[60]

Does this do any work? Yes. This reasoning presents two elements: first, that cable programmers and operators either create programming or choose what to air; and, second, that in doing so they seek to communicate messages on a variety of topics. The Court does not state explicitly that both elements are required, but the structure of the sentence so suggests, and, more importantly, having one without the other would not seem to constitute speech. The notion of seeking to communicate without actually editing or creating anything runs into the problem discussed in the previous Part: a company, in refusing to discriminate among the bits that it transmits, may seek to communicate a message (e.g., "We do not discriminate among bits"), but it is hard to see how it has engaged in speech. Otherwise, common carriers could say that they are speakers simply because they have not sought to discriminate (by challenging the regulations applicable to them). Indeed, one could imagine a wonderful form of bootstrapping: a common carrier challenging a regulation prohibiting discrimination as invalid under the First Amendment, and the First Amendment applying because the common carrier engaged in speech by refraining from challenging its regulation. As to the converse possibility, one could imagine editing that does not seek to communicate. Consider a computer editing function that automatically replaces words of eight or more letters with shorter synonyms, as a way of reducing the number of pages in a document without changing its substance. This would not only be a pretty terrible editor, but also one that is not communicating anything by its editing. There would be editing but no communication and thus no speech for First Amendment purposes.

It may be that the real communication of every company in every decision it makes is "We want to make money." Indeed, for a company that is a faithful agent, with shareholders who want the highest possible return, one would expect that everything it did was done in order to maximize shareholder value. But the point of free speech jurisprudence is that some of those company decisions entail a substantive communication—whatever the real motivation may have been—and others do not.

The formulation from *Turner I* comports with theory and practice. The Court and theorists have always required substantive

60. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994) (quoting City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986) (alteration in original)).

communication or self-expression as a requirement for the application of the First Amendment.[61] In every case in which the Court has applied the First Amendment, abridgement of substantive communication has been the issue.[62] Some of those abridgements are

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61. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1956) (stating that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"); SCHAUER, *supra* note 7, at 94 ("Communication dominates all the arguments that would with any plausibility generate a Free Speech Principle."); Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1274 (2010) ("The Supreme Court has been very clear about the First Amendment requirement that speakers must engage in definitive communication before receiving constitutional protection for speech."); Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 920 (1979) ("The Court is saying that the communication of ideas is at once the essential first amendment purpose and the essential first amendment property.").

One might reasonably ask what work "self-expression" is doing in the formulation in the text, on the assumption that self-expression is a substantive communication. Adding "self-expression" clarifies the inclusion of forms of expression that have been recognized as implicating the freedom of speech even though they arguably do not entail a clear substantive communication—in particular, recognized forms of art and symbolism. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) ("The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that '[s]ymbolism is a primitive but effective way of communicating ideas,' our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), wearing an armband to protest a war, displaying a red flag, and even '[m]arching, walking or parading' in uniforms displaying the swastika. As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." (alterations in original) (citations omitted) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943); Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 43 (1977) (per curiam); Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam))). One may reasonably contend that works of art and symbolism, and self-expression more generally, do entail a substantive communication, so adding "or self-expression" in fact adds nothing to the category of "substantive communication." I include both terms only in an excess of caution, to ensure that I have included everything that has been treated as part of the freedom of speech.

Even if "self-expression" does add something to "substantive communication," it does not do so in the context of Internet access providers. It seems safe to say that Internet access providers do not produce works of art or symbolism, and it is difficult to imagine what activities of an Internet access provider could constitute "self-expression" but not "substantive communication." (Indeed, one may fairly claim that no activity of an Internet access provider could be self-expression, but that is a stronger claim that is not necessary for this argument.) For ease of exposition, I will simply refer to substantive communication in the remainder of this Article, given that "self-expression" may not add anything and, in any event, does not add anything in terms of the activities in which Internet access providers engage.

62. *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 66 (2005) (noting that the Supreme Court has "extended First Amendment protection only to conduct that is inherently expressive"); *Spence*, 418 U.S. at 409 (finding that the display of an

content neutral, but the key is that they are interfering with a person's or entity's ability to communicate content. The touchstone of the Court's First Amendment cases has always been that the underlying activity entails an expression of ideas, even if it is not "a narrow, succinctly articulable message."[63]

This does not mean that the bar for exercising editorial discretion and "'see[king] to communicate messages on a wide variety of topics'" is high in this formulation. After all, cable operators generally do not have an all-encompassing philosophy that they are trying to foist on their viewers.[64] But in choosing among possible channels, they are choosing to offer subscribers some perspectives of the world (e.g., Fox News, MSNBC, and C-SPAN) and not others (e.g., Al Jazeera or Mexico's equivalent of C-SPAN).

This dovetails with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[65] In that case, the Court ruled that regulation of Boston's St. Patrick's Day parade triggered the First Amendment, because the parade was speech for First Amendment purposes.[66] The Court, in rejecting the argument that a parade was "merely 'a conduit' for the speech of participants in the parade 'rather than itself the speaker,'" stated that "the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme."[67] The Court explained that, "[r]ather like a composer, the Council [running the parade] selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."[68] The parade did not have a single, clear message, but—to use the parlance of *Turner I*—the parade's organizers did exercise editorial discretion through which they sought to communicate messages.

American flag with peace symbols was an activity "sufficiently imbued with elements of communication to fall within the scope of the First and Fourth Amendments").

63. *Hurley*, 515 U.S. at 569.

64. The closest thing to a coherent message would be "Cable television service is worth every penny you're paying for it."

65. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995).

66. *Id.* at 568–69.

67. *Id.* at 576.

68. *Id.* at 574.

First Amendment theory leads to the same conclusion as the Court's jurisprudence. As I already noted, there is no broad agreement on the precise contours of what constitutes speech. Every proffered definition of communication—and of the freedom of speech—has its detractors.

But this disagreement should not obscure two larger points. The first is that every conception of the First Amendment requires some substantive communication.[69] The theories differ only as to which sorts of communications the First Amendment should encompass and protect. Even the conception that would cover the most forms of communication—the marketplace of ideas—is still a marketplace of *ideas*.

The other is that the legal community has a working definition of communication that may be overinclusive, but that includes everything courts and theorists have regarded as communication. Communication seems to require, at a minimum, a speaker who transmits some substantive message or messages[70] to a listener who can recognize that message.[71] Conveying something other than a substantive message—say, high frequency electromagnetic radiation designed to destroy a building or smash atoms—is not speech. X-rays are many things, but speech is not one of them. (Consider the absurdity of an X-ray machine manufacturer challenging a regulation of X-ray machines on the ground that regulating X-rays is regulating speech.) Attempting to transmit a substantive message that is not readily recognizable is not communication or speech, because the

69. *See supra* notes 59, 61 and accompanying text; *see also* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1304 (2005) ("Under nearly every theory of free speech, the right to free speech is at its core the right to communicate—to persuade and to inform people through the content of one's message.").

70. In the remainder of this Article, I will use the term "message" to refer to one or more messages for the sake of convenience and brevity, thereby avoiding the repetition of the awkward "message or messages."

71. *See, e.g.*, Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973) ("Whatever else may or may not be true of speech, as an irreducible minimum it must constitute a communication. That, in turn, implies both a communicator and a communicatee—a speaker and an audience."); KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 54 (1989) ("When the message is an aspect of what the actor is trying to do and is understood by the audience as such, we can say comfortably that the act communicates the message and that the free speech principle is relevant."); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 206 (1972) ("[By] 'acts of expression' . . . I mean to include any act that is intended by its agent to communicate to one or more persons some proposition or attitude.").

message has not been communicated. A person who drinks milk out of a sippy cup as a protest against government spending may have in mind a message (e.g., the government is treating its citizens like children), but she has failed to communicate it. Thus, in order to communicate, one must have a message that is sendable and receivable and that one actually sends. Put differently, there are three basic questions: Is there a substantive message? Can it be sent and received? Has it actually been sent? One who cannot check off those boxes is not engaged in speech.

In some situations, the sending and receiving of the message is obvious. Readers of newspapers understand that newspaper editors have chosen the materials that the editors think are suitable. In other situations, the issue is a bit more complex. In *Turner I*, the Supreme Court suggested that cable subscribers understand both that cable operators choose some of the channels that they carry and that for other channels cable operators are mere conduits, not speakers. In yet other situations, a substantive message would be sent only if the editor effectively communicated its editorial stance to the users. A cable operator that secretly blocked content for substantive reasons—say, indecency, or positive references to its competitors—would be engaged in substantive editing, but it would not have sent a message to its users and thus would not have communicated that message.

The definition of communication above is overinclusive. As one scholar has noted, this basic definition—which he summarizes as "communicative acts are those intended to convey mental states and performed in ways that are reasonably understood to be for that purpose"—is a "'coarse' definition of communication, because it is useful but overinclusive."[72] It would include everything typically regarded as speech but also some things that are generally excluded from speech, such as *A* taking a drug, trying to describe to *B* what its effects feel like but failing, and then giving *B* some of the drug so that *B* might share *A*'s state of mind. *A* giving the drug to *B* would seem to satisfy the consensus definition of communication above, but most judges and theorists would not regard it as speech.[73] The disagreements come into play when one considers what elements to add to the bare-bones requirements.

72. John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1341 (2008).

73. *Id.* at 1341–42.

B. How Far Can This Take the Analysis?

Let us see, though, how far we can get sticking with *Turner I* and the overinclusive consensus definition of communication. Some conceptions of the First Amendment would not treat the editorial decisions of cable operators as speech, but I will treat that as settled ground in light of *Turner I*. If *Turner I* and the broad understanding of communication are a baseline, the First Amendment will encompass some things that most scholars and courts would not consider to be speech. But can we reach some useful conclusions about what is covered by the Free Speech Clause? The short answer is "yes."

We can start with two guideposts. *Turner I* creates a lower bound: whatever is equivalent to the sort of editing that *Turner I* found sufficient, by hypothesis, and in reality as a jurisprudential matter, constitutes speech for First Amendment purposes. The need to give meaning to the words "communication" and "message" create a second guidepost: we should reject any theory that turns every business decision into one that satisfies the First Amendment. Such an interpretation of the First Amendment borders on the absurd and thus should be disfavored.

The first guidepost does some work. Creating one's own material, or substantively editing others' material, will suffice under the *Turner I* standard. A webpage that a company creates is speech for purposes of the First Amendment. Note that this does not make the company a speaker for all purposes: an oil-exploration company is engaged in speech when it creates its webpage, but not when it drills for oil. But creating a webpage is a core expressive activity and will thus trigger the First Amendment. The same applies to substantively editing others' materials. For instance, an Internet access provider that explicitly provided a substantively edited Internet experience (e.g., a service that blocked access to indecent material and presented itself as a "family friendly" offering) would be a speaker under *Turner I*. By hypothesis, customers would understand that they were being offered an edited service. Like cable operators, the Internet access provider would be editing in a way that sought to communicate messages, and those messages (because explicit) would be receivable by the public. More generally, whenever an Internet access provider is willing not only to substantively edit but also to make that editing clear—"We block the content you don't want" or "We edit the Internet for you"—then it is engaged in speech for First Amendment

purposes. *Turner I* also indicates that a webpage that is merely a collection of links chosen by an editor for substantive reasons (like the Drudge Report) will be speech for First Amendment purposes.

By the same token, many other activities will not meet the test created by *Turner I* and the overinclusive definition of communication. Transmissions can be manipulated and edited in myriad ways, and many of those forms of manipulation and editing will not communicate any substantive messages—or, in the language of *Turner I*, will not "'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'"[74]

I will start with a basic form of manipulation that is particularly attractive to broadband Internet access providers: giving better service to an entity that pays more money and worse service to an entity that pays less. If the word "communication" is to have any meaningful content, this cannot qualify. Note that nothing about this form of communication is related to what is being priced (bits, oil, whatever). That is, the alleged communication would inhere in the pricing itself. Finding that tiered pricing constitutes communication verges on the absurd, as that would mean that virtually every business practice is a form of speech under the First Amendment. It is the rare business that *does not* give better service or products to an entity that pays more money. To return to the FedEx example: just as one would not claim that FedEx, in treating all mailings the same, was engaging in speech, one also would not claim that FedEx, in providing slower service for less money and faster service for more money, was engaging in speech by differentiating among mailings. Indeed, under this theory one could see prices of any sort as messages: the dichotomy would simply be between "no service" (if one is not willing to pay anything) and "some service" (if one is willing to pay something). Thus merely having prices would be speech under the First Amendment. And this principle would not be limited to companies transmitting speech. If tiered pricing communicates a message, it does so regardless of what is being priced. That is, if providing better service to higher payers sends a message, then it sends that message no matter what they are paying for. But if one considers giving better service based on higher payments to constitute communicating a message, that drains the words "communicate" and "message" of virtually all meaning.

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74. Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994) (alteration in original) (quoting City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986)).

What about other choices network operators may want to make? In particular, optimizing a network for some modes of transmission is a major category of manipulation that has been a focus of supporters and opponents of net neutrality. Most obviously, if an Internet access provider wants to prioritize the transmission of video, is that speech for First Amendment purposes? Such issues of network and protocol design arise frequently in networks. Telephone companies found that they could upgrade and optimize their copper wires for Internet service. The same is true for cable companies and their coaxial cables and for direct broadcast satellite and their satellites. Cable companies changed their network design and protocols to move from analog to digital, and cellular telephony providers did the same. Cable and satellite providers changed their networks to provide for high definition transmissions. In making these decisions, did these companies communicate and thus engage in speech under the First Amendment? If the government had regulated any of these transitions, would such regulations have implicated the companies' First Amendment interests?

Designing a network to operate more efficiently, or to gain more customers, would not constitute speech for First Amendment purposes, because there would be no substantive communication. Every network operator—indeed, every business—designs its operations to run efficiently and gain customers. Treating this as speech would turn every business decision into speech. The analysis does not change if the Internet access provider not only optimizes for efficiency and/or to gain customers but also so informs the world through its advertising—e.g., "We have the best network for you" or "We give you what you want." There would be a signal sent to the world, but there still would not be any substantive communication (and, again, a contrary conclusion would turn every business decision backed by advertising into a form of speech).

An Internet access provider could argue that, in optimizing one mode of communication over another, it had a more specific message. The choice entails a preference, and the preference entails a communication. The Internet access provider might prefer video as intrinsically better than other modes of communication, or might prefer video because of the content it can offer—arguing, for example, that video can present the world in ways that other modes of communication cannot. One could further imagine that this message is sent to the world via a motto—perhaps "Video is better than text," "We love video," or "Video captures what is important."

The motto would be speech under the First Amendment, but that does not transform the underlying activity into the freedom of speech, any more than "Flame-broiled is better than fried" or "We love flame-broiled" would transform cooking decisions into expressive activity encompassed by the freedom of speech. As to the underlying optimization for video: is that the same as the message in *Turner I*? No. Cable operators' choices among channels are choices that entail content. And note that the cable operators in *Turner I* had made a service-based choice in the design of their networks—they chose to transmit television and not other forms of communication. But the mere fact that they chose television service did not make them speakers; their substantive editorial choices did.

Turner I did not, of course, explicitly state that choices among modes of communication are not speech. But if preferring one mode of communication to another is, or encodes, a substantive communication, then every network design decision would be speech under the First Amendment. Every mode of communication has some advantages over others, such that one could say that the decision to optimize for that mode of communication thereby makes it easier to present information in a particular way. And every aspect of networks—the protocols, the hardware, the software, etc.—makes some communications easier relative to others. To pick one example, every decision that reduces latency has particular benefits for the transmission of video, and little benefit for modes of communication that are not latency sensitive. The problem is that none of these decisions entails a communication about content. Every mode of communication has different properties (that is what makes them different modes of communication), but that is totally separate from having differences in content. Nothing in the modes themselves entails such differences, and thus a choice among them is not a choice about content. There is no substantive message communicated by a network operator's optimization for a particular mode of communication.

If a network operator chose to optimize its network for messages about politics (or golf), that might be a substantive communication. Similarly, if it chose to give faster service to text messages on particular subjects, that might be a substantive communication. But choices among services do not entail substantive communications.

What about blocking material that the Internet access provider deems harmful? The key, as the previous discussion suggests, is whether the blocking entails a communication about content. In

blocking, is the blocker making a substantive decision about what content it wants to be associated with, and sending that message to its users? Blocking for the sake of keeping the network running (for example, blocking software that could bring down the network) is an example of nonsubstantive editing. If that were considered communication, then every action any network takes to protect itself—including ensuring adequate power supplies or air conditioning units—would be communication. But one can imagine blocking in which the network operator is blocking for substantive reasons and communicating those substantive reasons to its users. Indeed, that characterizes the hypothetical of the family-friendly service that blocks indecent material: the operator would be offering a service that was edited for content and presented as such to the public.

This does not necessarily mean that an editor must use a content-based filter to engage in substantive editing. If, for example, a family-friendly Internet service concluded that the vast majority of messages emanating from a particular server, or sent to a particular port, contained pornography, it might block all messages from that server or to that port as part of its commitment to blocking indecency. The reason for blocking would be content based. The filter would be a proxy for content. But the filter itself would not be content based.

This leads to the last major form of arguable editing that Internet access providers engage in: the blocking of spam and malware. Is such blocking covered by the Free Speech Clause? Before considering that question, one might want to ask whether anything turns on the answer. The net neutrality regulations allow Internet access providers to block spam and malware, and it is extremely unlikely that the government will ever regulate this aspect of Internet access providers' behavior. This means that, whether or not blocking spam and malware is part of the freedom of speech, it is extremely unlikely that the government will restrict Internet access providers' ability to engage in that activity. Does this render irrelevant the question whether blocking spam and malware constitutes speech?

The basic argument on each side is reasonably straightforward. If being a speaker for one purpose makes one a speaker for all purposes, then as soon as an Internet access provider engages in one form of speech, all its activities would be covered by the Free Speech Clause. The counterargument is that the First Amendment is framed in terms of speech, and the relevant question is whether a particular regulation abridges the freedom of speech. If the legal regime leaves

the speech acts of an entity untouched, then regulation of the entity's other acts does not implicate the Free Speech Clause.

The broadest version of the argument that one is a speaker for all purposes seems wrong. As I already noted, a company is a speaker for purposes of its advertisements, but that does not mean that what it is advertising is speech or that the company is a speaker for all purposes. A narrower version of the argument is that any regulation related to the conduct giving rise to speech is a regulation of the freedom of speech. But that still leaves the question of what relation is actually required.

The Supreme Court has applied laws of general applicability to speakers and held that they do not raise First Amendment issues.[75] But what about more specific laws that single out speakers without directly regulating their speech? The most relevant line of cases involves taxation of speakers. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,[76] the Court held the First Amendment applicable to taxation that discriminated among print publications.[77] A few years later, in *Arkansas Writers' Project, Inc. v. Ragland*,[78] the Court suggested that any law that singled out a set of speakers for special treatment was subject to First Amendment scrutiny.[79] But in *Leathers v. Medlock*,[80] the Court held that First Amendment review applies only to differential taxation schemes that threaten to suppress the expression of particular ideas or viewpoints, target a small group of speakers, or discriminate based on the content of speech.[81] *Leathers* stated that "differential taxation of speakers, even members of the press, does not implicate the First Amendment

75. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) ("[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."); Associated Press v. United States, 326 U.S. 1, 19–20 (1945) (applying generally applicable antitrust laws to a company's core First Amendment activities); *see also Associated Press*, 326 U.S. at 7 ("The fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices.").

76. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983).

77. *Id.* at 592–93.

78. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

79. *Id.* at 228; *see also Turner I*, 512 U.S. at 640–41 ("[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least some degree of heightened First Amendment scrutiny." (quoting *Ark. Writers' Project*, 481 U.S. at 228)).

80. Leathers v. Medlock, 499 U.S. 439 (1991).

81. *Id.* at 447.

unless the tax is directed at, or presents the danger of suppressing, particular ideas."[82]

The D.C. Circuit, meanwhile, has treated all regulations of cable operators as raising First Amendment issues. Some of these regulations directly relate to the speech in which cable operators engage.[83] Requiring cable operators to set aside some of their capacity for public, educational, and governmental channels, and for stations subject to leased access, for instance, could reduce the number of channels over which cable operators can exercise editorial control and thus limit their ability to engage in speech for First Amendment purposes.[84] Similarly, if the blocking of spam and malware were speech and a regulation had the effect of preventing an Internet access provider from engaging in such blocking, that regulation would reduce the ability of an Internet access provider to engage in speech.

Other regulations that the D.C. Circuit has subjected to First Amendment scrutiny have no direct connection to the cable operators' editing. The best example is the regulation of the rates that cable companies can charge to their customers. The D.C. Circuit, with little discussion, held that such regulation is subject to First Amendment scrutiny.[85] And the nexus between rate regulation and cable operators' exercise of editorial discretion is not obvious. One could argue that rate regulation reduces revenues, and that having less revenue limits the ability of a cable operator to produce the content it wants and to exercise editorial discretion as it sees fit.[86] But this would suggest that virtually every regulation that specifically applies to a company engaged in speech will be subject to First

82. *Id.* at 453.

83. For example, the vertical concentration limits, which limit the percentage of channels in which a cable operator has an ownership interest that it can include in its lineup, constrain operators' choices of which channels to air. *See* 47 U.S.C. § 533(f)(1)(B) (2006) ("[The FCC] shall establish[] reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest . . . ."); Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1130 (D.C. Cir. 2001) (applying First Amendment scrutiny to rules promulgated under § 533(f)(1)(B)).

84. *See* Time Warner Entm't Co. v. FCC, 93 F.3d 957, 973 (D.C. Cir. 1996) (finding that such regulation could present First Amendment issues, but rejecting a facial challenge to the particular statute at issue).

85. Time Warner Entm't Co. v. FCC, 56 F.3d 151, 181–82 (D.C. Cir. 1995).

86. *See* Christopher S. Yoo, *Architectural Censorship and the FCC*, 78 S. CAL. L. REV. 669, 687 (2005) (contending that "rate regulation had the unintended consequence of degrading the quality of existing cable offerings and foreclosing the emergence of higher quality channel packages despite viewers' willingness to pay for them").

Amendment scrutiny, because almost any regulation can have the effect of reducing revenue.

Unfortunately for this Article's purposes, the Supreme Court has not considered cases involving the rate regulation of cable television service or other regulations that have no more connection to speech than would any ordinary regulation.[87] That is, every regulation to which the Court has applied First Amendment scrutiny has had some additional element, and thus the Court has never considered the applicability of the First Amendment to a regulation whose only connection to speech is that it is not of general applicability and applies to an entity that engages in speech. And, needless to say, different conceptions of the First Amendment would treat these regulations differently. Conceptions focusing on autonomy and self-expression, for example, would reject as ridiculous the application of the First Amendment to economic regulation of companies engaged in speech. The absence of Supreme Court case law or conceptual agreement is unfortunate for my purposes because, in this Article, I want to see how far we can go based on broadly accepted sources and forms of reasoning. And with respect to generic regulations of speakers—that is, regulations that are not directly connected to the conduct giving rise to speech and that betray no censorious goals, no preference for content, and no desire to squelch particular speakers—there seem to be no broadly accepted sources, reasoning, or conclusions.

I do want to note, however, the connection between this discussion and the previous Parts of the Article. There are two lines at issue—one between speech and nonspeech, and another between

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87. The Supreme Court has invalidated statutes giving local officials authority to permit or ban distribution of newspapers and other forms of speech, but those cases focus on the possibility of content and viewpoint discrimination created by unbridled discretion to permit or ban. *See* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 767–68 (1988) ("[T]his Court has long been sensitive to the special dangers inherent in a law placing unbridled discretion directly to license speech, or conduct commonly associated with speech, in the hands of a government official."); *see also* Saia v. New York, 334 U.S. 558, 562 (1948) ("When a city allows an official to ban [loud-speakers] in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas."); Lovell v. City of Griffin, 303 U.S. 444, 450–51 (1938) (invalidating a regulation prohibiting the distribution of leaflets without the approval of the city manager). Indeed, in *Lakewood* the Court stated,

> This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.

Lakewood, 486 U.S. at 759.

regulations of conceded speakers that do not implicate the First Amendment and regulations of speakers that do implicate the First Amendment. The further the second line is pushed toward the application of First Amendment scrutiny to all regulation, the greater the pressure on the first line. Consider, for example, the significance of a conclusion that mere transmission is part of the freedom of speech, combined with a conclusion that the First Amendment applies to all specific regulations that reduce the speaker's revenues. Under such a scenario, all regulations specifically applicable not only to common carriers but also to carriers like FedEx would be subject to First Amendment scrutiny. This does not make either of these conclusions wrong, but it does highlight what is at stake.

To return now to the blocking of spam and malware: one cannot say with confidence what, if anything, turns on the question whether the blocking of spam and malware is part of the freedom of speech. The net neutrality regulations impose no direct burden on such blocking. The regulations require nondiscrimination but specifically allow the blocking of spam and malware. But, insofar as it reduces the revenues of Internet access providers, a nondiscrimination regime may at the margin reduce providers' ability to invest in spam-blocking software. This is a pretty tenuous connection, but as the previous discussion indicates, I do not think we can safely reject it.

Assuming that the question is relevant, does blocking spam and malware constitute communication, and therefore speech for First Amendment purposes? It depends. As I have already explained, a transmitter protecting its own network is engaged in nonsubstantive editing. But protecting users from receiving material that they want to avoid is substantive editing. It may be that the transmitter's filter is content neutral, but if its reason for blocking the content is substantive, then it is engaged in substantive editing. And if the transmitter communicates such substantive blocking to its users, that would seem to satisfy the requirements for communication and thus for the freedom of speech.

This means that, to determine whether the First Amendment applies to an Internet access provider's decision to block spam and malware, a court must determine both why the provider engaged in such blocking and, if there were substantive reasons, whether it actually communicated its substantive reasons to its users. In giving meaning to the application of the Free Speech Clause to purported speech, an adjudicator will have to determine if communication is at issue, and communication will often be context specific. To see if a

substantive message has been sent and received, a court must determine whether a message was substantive and examine the means by which it was sent.

Is this a recipe for disaster, in that it requires courts to make determinations about both the existence of substantive editorial decisions and the communication of those decisions to the public? Perhaps, but courts make similar decisions all the time. It may be that they make them poorly and that the law should favor more easily administrable tests, but that is an issue that transcends the considerations addressed in this Article.

To return to the question at hand: is the blocking of spam and malware speech for First Amendment purposes? As the prior discussion indicates, we cannot answer that question without knowing more. Depending on why it is done and how it is communicated, such blocking may or may not be speech under the First Amendment. Does the provider block solely to keep its network running efficiently, or also because it believes that its customers do not want the blocked content? If it blocks for substantive reasons (such as to protect its customers from content they do not want), does it communicate that to customers? Does it advertise itself as a company that "blocks material that you would not like" (or words to that effect)?

C. Confidence Redux

It turns out, then, that *Turner I* plus an overinclusive definition of communication can take the analysis reasonably far, although it still falls short of definitively resolving the question whether Internet access providers' actions implicate the Free Speech Clause. That final answer will depend on highly fact-specific and contextual determinations.

How would the answers differ if one were to resolve the questions I left unresolved—involving what conception of the Free Speech Clause, and what specific definition of communication, one should adopt? Would adopting a specific conception and a specific definition provide different answers to the questions addressed in the previous Parts? Yes, but only in the direction of finding that less of the Internet access providers' activity is speech under the First Amendment. The reasoning I have employed relies on a broadly shared baseline that is overinclusive. None of the conceptions of the freedom of speech or the potential definitions of communication

would find the Free Speech Clause applicable to more decisions by network operators than this Article's discussion suggests. Some conceptions of the Free Speech Clause, and some definitions of communication, would encompass fewer decisions by network operators than *Turner I* and the broad definition of communication would encompass.[88]

If we are not prepared to limit or cabin *Turner I*, then adopting a particular conception of the Free Speech Clause and/or a particular definition of communication might affect only the question whether blocking spam and malware constitutes part of the freedom of speech. It would not change the answers to any of the other questions discussed. It might change the rationales for the other answers, and the confidence one has in those answers, but the answers themselves would remain the same.

That said, adopting a conception of the Free Speech Clause and/or a definition of communication more precise than the one outlined in this Part would allow for more precision and more confidence. This is not surprising. The greater the agreement on how one interprets an area of law, the greater the likelihood of having confidence in a given conclusion. There would still be limits to this confidence, of course—none of the proffered conceptions or definitions of communication admits of high levels of clarity. But if, for instance, we were to decide that the First Amendment is focused on individual self-expression or personal autonomy, we would conclude with great confidence that it would not cover the claims of any company engaged in transmission.

The analysis in this Part is contingent on Supreme Court case law that could change and a definition of communication that is by no means incontestable. But incontestability is an unrealistic standard. The point of the analysis in Parts II and III is that, even without more specific agreement, scholars can have reasonable confidence about most of the potential speech issues raised by net neutrality regulations.

88. If, for example, free speech, properly understood, is about individual self-expression or personal autonomy, then decisions by a corporation do not qualify because there is no individual self-expression or personal autonomy involved. *See supra* note 61 and accompanying text.

CONCLUSION

First Amendment analysis is notoriously open-ended and dependent on the conception of the freedom of speech that one adopts. The aim of this Article has been to consider whether a basic legal toolkit and broadly shared principles can produce useful answers to some questions about what the freedom of speech encompasses, focusing on the nondiscrimination principles arising out of net neutrality rules. One way of understanding this analysis is as addressing the extent to which lawyers who do not have a shared conception of the First Amendment can use conventional legal analysis to determine what the freedom of speech encompasses. And one could substitute "the Supreme Court" for "lawyers" in the previous sentence.

The point of this Article is that we can start from broadly shared premises and reach conclusions in which we can be reasonably confident. We will never reach unanimity or certainty. That is probably too tall a task for a field as mushy as law. But I believe we can reach a level of reasonable confidence. We do not have to wait for word from on high—or from the nearest thing in the lawyer's universe, the Supreme Court—to find meaningful guidance.